IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 04-5099

MEMBERS OF THE
PEANUT QUOTA HOLDERS ASSOCIATION, INC,
AUGUSTUS GARRETT, JEROME PAULK,
FAYE PAULK, and D.U- PULLUM

Plaintiff-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

APPELLEE'S OPPOSITION TO APPELLANTS' PETITION FOR REHEARING *EN BANC*

PETER D.KEISLER
Assistant Attorney General

DAVID M. COHEN
Director

JANE W. VANNEMAN
Senior Trial Counsel
Commercial Litigation Branch
Department of Justice
Attn: Classification Unit
8th Floor
1100 L Street. N.W.

Washington, D.C. 20530
Telephone: (202) 307-1011
Fascimile: (202) 5144-8624
Attorneys for Defendant-Appellee

November 30, 2005

* * * * *

TABLE OF CONTENTS

PAGES

APPELLEE'S OPPOSITION TO APPELLANTS' PETITION FOR REHEARING *ENBANC* 1

Statement 1

Argument 3

I. The Panel Did Not Violate *Kelo* 6

II. The Panel's Decision Is Not Contrary to *Eastern Enterprises* 10

III. The Panel Decision Does Not Conflict With *Maritrans* 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES PAGES

Arctic King v. United States,
59 Fed. Cl. 360 (2004) 9

Calloway v. Block,
763 F.2d 1283 (11th Cir.1985) 8

Competitive Enterprises Institute v. USDA,
954 F. Supp. 265 (D.D.C 1996) 8

Cook Farms,
302 S.E.2d 574 (Ga. App. 1983) 9

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 5, 10, 11

Kelo v. City of New London,
125 S.Ct 2655 (2005) 5, 6, 9

Loveladies Harbor v. United States,
21 Cl. Ct 153(1990), aff'd,
28 F.3d 1171 (Fed. Cir. 1994) 13

Maritrans Inc. v. United States,
342 F.3d 1344 (Fed. Cir. 2003).....5, 12, 13

Maritrans v. United States,
51 Fed. Cl. 277 (2001) 13

Members of Peanut Quota Holders v.
United States,
60 Fed. Cl. 525 (2004) 2, 7

New York Central R.R. v. White,
243 U.S. 188 (1917) 9

Rogers Truck Lines v. United States,
14 Cl. Ct 108 (1987) 7

STATUTES AND REGULATIONS

7 U.S.C. §1358-1 2

7U.S.C. §1358 4

7 U.S.C. §7952-54 6

7 U.S.C. §7271 3

7 U.S.C. §7957 6

7 U.S.C. §7957 3

7 U.S.C. §7959 6

MISCELLANEOUS

H.R. Conf. Rep. 107-424 (May 1, 2002) 8

1990 USCCAN 4656-5284 8

Agricultural Allotments As Property,
79 Harv.L.Rev., at 1203 13

No. 04-5099

THE UNTIED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMBERS OF THE PEANUT QUOTA HOLDERS ASSOCIATION, INC., AUGUSTUS GARRETT, JEROME PAULK, FAYE PAULK, and D.U. PULLUM
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

APPELLEE'S OPPOSTION TO APPELLANTS' PETITION FOR REHEARING *EN BANC*

STATEMENT

Petitioners, individual members of the Peanut Quota Holder Association, Inc., owned farms to which peanut quotas had been allocated under the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 155, 110 Stat. 888, 922-30 (1996 Act). The peanut quotas allowed the Petitioners to obtain favorable loans for their peanut crop which effectively maintained an artificial minimum price for the crop. Beginning in the late 1960s and extending through the abolition of the program, the quotas could be sold or leased and the Petitioners allege that they leased their quotas to others.

In 2002, Congress amended the peanut quota program by repealing the marketing quota program, by establishing a new program of benefits, the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 §1301-1310, 116 Stat 124, 166-83 (2002 Act), and by establishing a "buyout" of quota holders. Pursuant to the new program, the quota system was abolished.[1] Any farm owner, such as Petitioners, may produce peanuts and receive some financial benefits. However, under the 2002 Act, certain other benefits are available only to those who had actually produced peanuts during the period 1998-2001. Because Petitioners owned farms but did not engage in the production of peanuts during 1998-2001, but rather leased their quotas, certain new benefits under the 2002 Act are not available to Petitioners.

Petitioners filed this suit claiming that the Government took the quotas they possess under the 1996 Act and that, accordingly, they were entitled to just compensation under the Fifth Amendment. The Panel held that the quotas which Petitioners leased were "property" but that no taking had occurred. According to the Panel, the quotas constituted legislatively-created benefits and neither the statute nor the surrounding circumstances indicated that

---

[1] The Panel appears to have erroneously assumed that the 2002 Act continued the quota system. Quotas were authorized pursuant to 7 U.S.C. §1358-1 (b)(2000 ed.), and repealed by Section 1309 of the 2002 Act 116 Stat. 179. There are now no marketing restrictions that limit, for any use, the possible pounds that can be marketed. Therefore, anyone can market an unlimited amount of peanuts for domestic food or other uses. Members of Peanut Quota Holders v. United States, 60 Fed. Cl. 525, 527 (2004)(plaintiffs are free to produce as many peanuts as they can on their farms without penalty).

Congress intended those benefits to be irrevocable. Accordingly, the Congress retained the ability to legislatively abolish the benefits without creating a taking for which compensation was due.

ARGUMENT

The fundamental premise of the petition is that Congress "transferred" Petitioners' peanut marketing quotas to those to whom Petitioners previously leased their quotas. This allegation is incorrect. Nothing was transferred. Congress abolished one program which provided for peanut quotas and established another program which does not include a quota system.

Pursuant to the new program, those persons who owned farms and had leased their quotas during the period 1998-2001, such as Petitioners, are eligible for marketing loans on the same terms as those to whom they had leased their quotas under the 1996 Act. 7 U.S.C. 7957(b).

Petitioners are not eligible for two new types of payments - direct payments (DP) and countercyclical payments (CCP) - because they did not produce peanuts on their farms during the four years from 1998 to 2001, as required by the 2002 Act. 7 U.S.C. 7952-53; See 7 CFR Part 1405, 1412.

Finally, pursuant to the new program, persons such as Petitioners received a "buyout" in recognition of the abolition of quotas. The one-time lump sum amount which could be received pursuant to this provision is almost twice the support level

under the 1996 Act and far more than the presumed leased value of the quota for the 2002 crop year (accounting for production costs and profit), the last year addressed in the 1996 Act. 7 U.S.C. 7959; 7 U.S.C. 7271 (2002 ed). 7 C.F.R. Part 1412.

In essence, the Petitioners contend that they are entitled to compensation because, although they are eligible for marketing loans, they are not eligible for DP and CCP under the 2002 Act. They contend that their ineligibility entitled them to compensation because section 155(i)(6) of the 1996 Act provided, by amendment to 7 U.S.C. 1358b (2000 ed.) that "[a]ny farm poundage quota transferred ... [pursuant to the statute] shall not result in any reduction in the farm poundage quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm. See 7 U.S.C. §1358b(l)(6)(2000 ed). According to the Petitioners, they relied upon this provision of the 1996 Act when they decided to lease their quota. In effect, they contend that the 2002 Act's limitation on eligibility for DP and CCP to persons that actually produced peanuts under the 1996 Act constituted a transfer of their quotas under the 1996 Act to those persons that actually produced peanuts. Petitioners contend that this "transfer" violated their expectation that their quotas would not be reduced, engendered by section 155(i)(6). Finally, the Petitioners contend that the amount that they received under the "buyout" did not constitute the fair market value of their quota.[2]

---

[2] Because Petitioners do not develop this argument, we do not specifically address it further.

Petitioners are not entitled to compensation because, as the Panel correctly held, there has been no taking. Congress abolished one program providing for quotas and replaced it with another program which does not include a quota system. Petitioners do not deny that Congress could take this action without effecting a taking. Petitioners rely solely upon a provision of the 1996 Act which provided that their quotas would not be reduced solely because they leased their quotas. However, the quota was not reduced; rather, it was eliminated, and now, everyone can market an unlimited amount of peanuts for domestic food use (the use regulated by the former quota system). In any event, the provision of the 1996 Act governing quotas could not have been reasonably interpreted as a promise that the quota system would never be repealed. In fact, Congress has repealed the quota system and the Petitioners' quotas have not been reduced. Indeed, although Petitioners phrase their argument in terms of a transfer of or reduction in their quotas, a close reading of their petition demonstrates that the quotas were valuable because they resulted in the provision of price supports at a higher rate than non-quota peanuts ("additional" peanuts) under the 1996 Act, and, thus, gave them a competitive advantage as compared to non-quota holders. Under the 2002 Act, Petitioners are not eligible for the new payments (e.g., DP and CCP) because they did not produce peanuts during the requisite period. Thus, Petitioners' contention amounts to a contention that they are entitled to compensation because they are no longer eligible for a benefit which had provided them a competitive advantage in the leasing markets. But nothing required the Congress to

provide for Petitioners' continued eligibility for any or all peanut program benefits, much less a competitive leasing advantage. Even the statute upon which Petitioners rely regarding reductions in quota cannot be twisted so as to be considered a guarantee that Petitioners' eligibility for program benefits, and/or a competitive advantage over producers/lessees, would continue. Ending the quota program, in fact, released the restrictions of the former quota program and expanded, rather than reduced, the amount of peanuts that could be marketed for domestic food use.

Petitioners incorrectly rely upon Kelo v. City of New London, 125 S.Ct. 2655 (2005), because nothing belonging to the Petitioners has been transferred to another person. Rather, one program in which Petitioners participated has been abolished in its entirety and a new program has been established in which Petitioners may participate. The Panel's decision is not contrary to the principles of Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), because there is no retroactivity. Finally, the Panel's decision is not contrary to Maritrans Inc. v United States, 342 F.3d 1344 (Fed. Cir. 2003), because no one has been singled out to bear a burden which should be borne by the public as a whole.

I. The Panel Did Not Violate *Kelo*

Petitioners' reliance upon the Supreme Court's decision in Kelo v. City of New London, 125 S.Ct. 2655 (2005), issued after the Panel issued its decision in this case, is misplaced.

Petitioners acknowledge that they do not rely upon the holding of Kelo which actually rejected the claim of the property owner. Instead, they rely upon an observation by the Court to the effect that the United States may not take the property of one person for "the sole purpose of transferring it" to another private party.

Even if that proposition is true, it is not relevant here. In the 2002 Act, Congress ended the old quota program as of May 13, 2002, effective with the 2002 crop. In section 1301 et seq., Congress eliminated the quota restrictions so as to allow all producers on all farms to market as many peanuts as they wish for domestic food use. See section 1309 of the Act, 116. Stat. 179. 7 U.S.C. §7959. Moreover, under the 2002 Act, all producers on all farms, including Petitioners, are eligible for the new single-tiered loan system. 7 U.S.C. §7957.

The 2002 Act also provides that those who engaged in the production of peanuts during the period 1998-2001 are provided a "base" in pounds (7 U.S.C. §7952) derived from then-production history. The DP and tie CCP are calculated on the basis of this poundage base.[3]

Because Petitioners did not produce peanuts during the requisite period, they were not allocated a "base" and, hence, they are not eligible for the DP and CCP payments. But DP and CCP eligibilities

---

[3] The new base is not a quota. It does not restrict any marketings. It is not a license to market. Rather, it creates an eligibility for certain new payments which are not dependent upon any current production of peanuts.

are not quotas and do not function as quotas. Rather, as the trial court correctly described them, the program benefit under the DP program is a payment calculated according to the poundage of the "base" (calculated upon historical production), and the payment under the CCP program is based upon the "target price" which is set by statute, see Members of Peanut Quota Holders Ass'n, 60 Fed. CL 524, 526-27 (2004), with the "target" price per pound set at a lower level than the former quota rate per pound. 7 U.S.C. 7952-54. Congress crafted these new payments for those persons who had produced peanuts during 1998 and 2001. Anyone who produced peanuts during that period was assigned a poundage "base" upon which the DP and CCP payments would be made, but no current peanut production was required. By contrast, market assistance loans were made available to everyone who produced peanuts. In contrast to the former quota program, the DP and CCP programs do not include any restriction on who can or cannot market peanuts for domestic food use.[4] See Members of Peanut Quota Holders Ass'n, 60 Fed. Cl. at 526-27. In sum, in contrast to the pre-2002 Act, any and all persons under the new system, including Petitioners, may produce all the peanuts they wish for domestic food use and receive loans equally with all other farms. No base is required for any marketing or any loan, nor is any quota allocated or needed under this new program.

---

[4] See Rogers Truck Lines v. United States, 14 Cl. Ct. 108 (1987)(no constitutionally protected right to freedom from competition).

Thus, there has been no transfer of Petitioners' quotas. There is no quota. Congress abolished the quotas in favor of a new program. Petitioners are not eligible for portions of this new program. However, this ineligibility does not result from a transfer of their quotas. Rather, under one program, their farms were eligible for a certain type of benefit, which gave them a competitive advantage. Subsequently, Congress abolished that type of aid and established a new multi-faceted program. Petitioners are not eligible for parts of this new program because Congress adopted eligibility criteria which the Petitioners cannot fulfill. However, as the Panel correctly explained, nothing prevented the Congress from deciding to utilize the criteria it considered relevant to establish eligibility for DP and CCP. Congress' choice of pre-2002 production history as one criterion for eligibility represents a policy choice and this policy choice does not entitle Petitioners to compensation on the ground that they cannot satisfy the criterion selected by Congress.

Moreover, the repeal of the quota should have come as no surprise to Petitioners. Immediately after enactment of the 1996 Act, Congress began to address some of the issues important to the peanut industry, including the preference for producers, as compared to mere landowners/non-producers, and the fact that the added costs that peanut producers incurred in leasing quotas from those with farms with an allocated quota contributed to the fact that the domestically-subsidized price of peanuts, for consumers and for Government food programs, was almost twice the world price of peanuts. The policy

choices that led to the 2002 Act also built upon earlier developments in international trade for agricultural commodities, since the 1960s, and again in the 1980s and 1990s.[5] In various trade bills, Congress had moved gradually towards a more market-oriented approach for virtually all agricultural commodities, including peanuts.[6] Indeed, for more than twenty years after Calloway v. Block, 763 F.2d 1283, 1290 (11th Cir. 1985), the seminal case on peanut quotas, which addressed policy shifts in the quota program away from farm owners and in favor of producers, there were a variety of complex factors which led to changes in the peanut program, including: evolving political and policy considerations involving domestic considerations relating to peanuts; significant developments in laws and treaties governing international trade; and, Federal budget considerations relating to the costs of the peanut program. Therefore, it was only a matter of time before Congress repealed the peanut quotas, as it

---

[5] See generally H.R. Conf. Rep. 107-424 (May 1,2002).

[6] E.g., 1990 USCCAN 4657, 4675-76.; 1990 USCCAN 4656-5284. See generally Competitive Enterprises Institute v. USDA, 954 F. Supp. 265, 273 (D.D.C 1996). H.R. Conf. Rep. 107-424 (May 1, 2002), 2002 USCCAN 141.

had repealed quotas for all other agricultural commodities (except tobacco) in earlier farm bills.[7]

Finally, even if there was a transfer of Petitioners' quota, this was not the "sole purpose" of the 2002 Act. As described above, the peanut program was changed in 2002 for many reasons, just as many reasons caused the program to change in years since the early 1940s, when the first peanut program was established.

Accordingly, the Panel did not violate Kelo.

II. The Panel's Decision Is Not Contrary *to Eastem Enterprises*

As a result of their mischaracterizations of the old and new peanut programs, Petitioners' reliance upon Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), is misplaced. Petitioners meet *none* of the Eastern Enterprises standards relating to

---

[7] In Cook Farms, 302 S.E.2d 574 (Ga.App. 1983), the state court warned long ago that those participating in the peanut quota program should protect themselves in lease terms against possible changes in the law. See Arctic King v. United States, 59 Fed.CL 360, 379 (2004) (foreseeable that Congress would remedy overcapitalization of pollack fishery; focus properly upon recent catch history and production levels); see New York Central R.R. v. White, 243 U.S. 188, 198 (1917)(no person has vested interest in rule of law entitling person to unchanged Federal benefits).

Therefore, as Petitioners appear to recognize, Congress possessed the right, to grant to those who had actually engaged in the production of peanuts for 1998-2001, the four years prior to the 2002 Farm Bill, the status of "historic peanut producer" for purposes of calculating benefits under the new 2002 bill.

"retroactive" legislation as to quota restrictions and marketing loans. First, no part of the legislation was retroactive. It involved only future payments and marketings. It did not assign liabilities for past activities, as in Eastern Enterprises. In Eastern Enterprises, the retroactive effect was severe because it extended decades into the past. Further, to the extent that Petitioners rely upon Eastern Enterprises for their argument that somehow the 2002 Act retroactively violated the 1996 Act in "reducing" their quota because they were not producers from 1998-2001, Petitioners' reliance is misplaced. Petitioners' quotas were not "reduced" for any purpose when the 1996 Act was in force, or ever (the quota restriction was simply eliminated) and the 1996 provision upon which they rely – that the lease of their quota would not reduce their quota – is no longer in force due to the 2002 Act.

Further, Petitioners proffered to the trial court little, if any, evidence as to what they now claim are undisputed substantial economic burdens, and/or as to causation — whether it was the repeal of the quota, or other factors, that may have imposed an economic burden upon one or more of the named individual Petitioners. While they claim that the 2002 Act imposed a "substantial" economic burden upon them (App.Br.12), they fail to address key points that we addressed in our briefs, for example, relating to the buyout payments - that the amount of the buyout was generous, substantially more per pound than the old quota support price for the 2002 crop under the 1996 Act, the last crop addressed in that Act. Moreover, in the 2002 Farm Bill, Congress did not deprive Petitioners of their farmland, farm

equipment, or their crops. Petitioners are also not excluded from the peanut loan program or from peanut markets. Rather, like all persons now, Petitioners are able to secure marketing loans upon the same terms as any other producer, grow an unlimited quantity of peanuts, and market them without penalty. Or, Petitioners were able to offer their land to historic producers who could have designated Petitioners' land as the new "base" with a particular yield level, such that the producers would lease the land or otherwise compensate Petitioners for the use of the land with its DP and CCP benefits under the new base program.[8]

Thus, as the Panel correctly recognized, Petitioners failed to demonstrate that they experienced any significant adverse economic effect caused by the repeal of the quota.

Accordingly, the 2002 Farm Bill did not constitute an unlawful retroactive taking under

---

[8] Petitioners argued earlier that the 2002 Farm Bill destroyed, totally, the quota "asset." However, they confused matters by claiming that the "dollar value of the interferences varies with different classes of quota holder..." Id. While the trial court did not certify any class pursuant to Rule23, Petitioners argued on behalf of three undefined classes.

However one views these three "classes," Petitioners do not dispute that, under the 2002 Farm Bill, all of them are eligible for marketing loans for peanuts at $355 per ton, they were eligible for $.55 per pound quota buyout, and their land could be designated by those defined as historic producers as the base from which future DP and CCP payments would be made. Thus, there was not a quota "asset" that was destroyed "in total," as Petitioners contended.

Eastern Enterprises and the Government did not transform Petitioners' lease arrangements into "involuntary sales." Therefore, the Panel correctly held that no compensation was owed to Petitioners.

III. The Panel Decision Does Not Conflict With *Maritrans*

Petitioners appear to contend that they were singled out for adverse treatment by the 2002 Act They argue that Congress imposed an unlawful burden upon them because the 2002 Act "fails to deal uniformly with the industry and with the rules that governed all participants in the industry prior to that Act."

If we understand Petitioners' contentions correctly, the decision in Maritrans Inc. v. United State, 342 F.3d 1344 (Fed. Cir. 2003), does not provide any support to Petitioners' petition. Petitioners were not "singled out" for any new restrictions with respect to the new peanut base program created. Rather, Congress lifted all restrictions on peanut production, and did so equally for everyone involved either in the production of peanuts or those who owned land upon which peanuts could be grown — Petitioner land-owners and peanut producers. Congress provided for a new and complex structure of payments and benefits - including a new "base" program of payments, and non-recourse loans — and ultimately decided who would receive the new DP and CCP payments and who would not.

In any event. Petitioners cite to no law or authority for their proposition that, absent due process concerns, Congress must "deal uniformly" with the peanut industry and "with the rules that governed all participants in the industry prior to that Act." App.Br.14. There is no such authority. As the Panel concluded, Congress possesses the power to legislate. And, particularly in a subject matter area so broad as nationwide farm bills and agricultural commodities, it is difficult to imagine any standard by which courts could evaluate whether Congress dealt "uniformly" with all participants in any particular industry, such as the peanut industry, with all of the implications for the domestic economy, international trade, and the Federal budget.

Therefore, contrary to the arguments made in their petition, this Court's decision in Maritrans dooms their claim. In Maritrans, the property declined in value by only 13.1 per cent due to the Government's action. This decline was not enough of a diminution in value to indicate that Maritrans was carrying an undue portion of the burden created by the legislation. Id. at 1358.[9] The Court noted that Maritrans appeared able to regain a significant portion of its initial investment in the barges by selling them. Thus, the economic impact factor weighed against Maritrans' takings claim. Id. at 1358. Cf. Loveladies Harbor v. United States, 21 Cl. Ct. 153 (1990), aff'd, 28 F.3d 1171 (Fed. Cir. 1994)

---

[9] The Court of Federal Claims cited numerous cases that suggested that diminutions in value approaching more than 85 to 90 per cent do not necessarily establish a takings. Maritrans v. United States, 51 Fed. Cl. 277, 282 (2001).

(property essentially worthless after Government action).

Here, Petitioners still own their land, some fanning equipment, and they can use their land to grow peanuts or other crops. Moreover, they were eligible for the quota buyout. Their land is hardly "worthless" as a result of the 2002 Bill, as was the case in Loveladies Harbor.[10]

Accordingly, the Panel decision conflicts with nothing in Maritrans.

Conclusion

For the foregoing reasons, appellee respectfully requests that this Court deny Petitioners' petition for rehearing en banc.

---

[10] In any event, Petitioners failed before the trial court even to attempt to quantify the extent, if any, of any diminution in the value of their land. Nor did they provide any evidence as to the *remaining* value of their farm land. See *Agricultural Allotments As Property*, 79 Harv.L.Rev. at 1203 (land values affected by many factors, allotments are bat one). Petitioners barely mention this theory on appeal.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

/s/
DAVID M. COHEN
Director

/s/
JANE W. VANNEMAN
Senior Trial Counsel
Commercial Litigation Branch
Department of Justice
Attn: Classification Unit
8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 307-1011
Facsimile: (202) 514-8624

TERRENCE JACKSON
United States Department
of Agriculture
Office of the General Counsel
Washington, D.C.

Attorneys for Defendant-Appellee

November 30, 2005

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on November 30, 2005, I caused to be served by United States mail, postage prepaid, copies of "APPELLEE'S OPPOSITION TO Petitioners' PETITION FOR REHEARING EN BANC" addressed as follows:

David Wm. Boone
Boone & Stone
3166 Matbieson Drive
Atlanta, Georgia 30305

/s/